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Supreme Court of the United States

OCTOBER TERM 1938

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

against

HERBERT A. SMITH, JR.,
Respondent.

REPLY BRIEF FOR PETITIONER

LOUIS MEAD TREADWELL,
Attorney for Petitioner.

HENRY B. POTTER,
JOHN J. MANNING,
Of Counsel.

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Petitioner submits in this reply brief its contentions with reference to several points raised in Respondent's brief.

POINT I

The Respondent's statement of facts is misleading.

In some instances the brief states conclusions from the Respondent's testimony as the established fact without referring to contrary testimony of Petitioner's witnesses. In several instances the brief asserts that there is no evidence of a fact clearly covered by the testimony of Petitioner's witnesses.

The opinion of the Circuit Court of Appeals contains a full and fair statement of the facts (R. 261-263).

POINT II

The distinction between defective equipment and other types of negligence is unsound.

The Respondent's brief seeks to distinguish certain of the "choice" cases which do not involve defective equipment. These cases involve negligence in failure to clean up oil[1] or failure to rig life-lines[2], each of which resulted in making a deck an unsafe place for the seaman, and failure to provide an adequate crew[3] rendering a vessel unseaworthy.

There seems no logical distinction for the purposes of the instant discussion between such acts of negligence and the negligence which permits or fails to repair defective equipment.

The significant fact in each situation is the creation through the defendant's fault of a hazard which results in injury to the seaman.

Defendant's liability depends not on the type of negligence but on the facts of negligence and proximate cause.

Similarly, assumption of risk should not depend on the type of negligence which created the hazard but rather on whether the seaman knew of the hazard and assumed it voluntarily and unnecessarily.

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1. *Holm* v. *Cities Service Transp. Co.* (C.C.A. 2nd, 1932), 60 Fed. (2d) 721.
2. *Johnson* v. *United States* (C.C.A. 2nd, 1935), 74 Fed (2d) 703.
3. *Scheffler* v. *Moran Towing and Transportation Co.* (C.C.A. 2nd, 1933), 68 Fed. (2d) 11.

POINT III

If assumption of risk is to be recognized in any case it can not logically be eliminated in cases involving defective equipment.

Unless some neglect of the defendant proximately causes the plaintiff's injury, the question of assumption of risk is not relevant. Where the seaman is hurt through no fault of the defendant he can establish no case and an affirmative defense is not called for.

Assumption of risk is only significant where it defeats recovery even though the Court has found the defendant guilty of negligence. In the *Holm* case, the Court found the defendant negligent in failing to remove the pools of oil which made the deck dangerous. In the *Johnson* case, the Court found the defendant negligent in failing to put up life-lines. In each case, however, the Court found that the seaman had no business on that particular deck at the time, knew of the danger, and wilfully selected the dangerous route instead of a known safe route.

If the defense of assumption of risk is to be retained in any case, it would be clearly illogical to deny it merely because the particular hazard involved is described as defective equipment. Just as great a hazard may be created by negligent failure to provide a firm footing, adequate lighting, proper life-lines or other safety devices, or by a neglect to provide a safe working place.

Suppose a seaman, scorning stairs, elects to jump through a hatch to a lower deck and is injured! There being no fault of the employer contributing to the injury, no question of assumption of risk as a defense arises.

But suppose that the seaman in jumping to the lower deck lands on a piece of equipment which is defective

through the employer's neglect and therefore gives way under his weight, causing him injury! Clearly the employer should not be held liable. If not, it must be because the seaman assumed the risk.

Suppose that the cook on Petitioner's vessel, preferring the atmosphere and companionship of the engine-room to that of the galley, elects to peel potatoes standing on the low pressure bearing support. Assume that he does this with full knowledge of the dangers involved, including the defective step-plate.

If the movement of the vessel throws him against the machinery, causing him injury, we have no need to discuss assumption of risk for he can establish no fault on the part of Petitioner.

But suppose that when he finishes his work and attempts to step down, he trips on the defective step-plate and is injured! His injury is just as much a proximate result of Petitioner's negligence involving defective equipment as was the Respondent's injury. It seems obvious, however, that Petitioner should not be liable for the cook's injury. The reason must be that the cook assumed the risk.

It is Petitioner's contention that the respondent had no more business climbing up on the bearing support to feel the bearing than the cook had climbing up there to peel potatoes. The distinction, if any, is surely one of degree and not of principle.

Respectfully submitted,

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